



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-95-5

FACTS:

You are the Mayor of a City. You have been advised that City employees are being offered a discount for cellular telephone service by the City's cellular telephone carrier ABC. The City employees have been contacted by means of a promotional bulletin informing them of the "Government Rate Offer" being made available to all City employees. As you understand it, ABC is offering a government employee group rate that matches the municipal monthly service and air time rates. In comparison, an individual not employed by the City would pay a rate that is \$9.00 more than the current municipal rate. In addition, you are informed that certain municipal employees propose to be billed for personal cellular telephone service through their municipal agencies.

ABC has provided the following additional information. The discount being offered to City employees is the same as that being offered to various other municipalities in New England.^{1/} Moreover, ABC states that the same discount is available to some federal government employees^{2/} as well as to the employees of numerous large corporations located throughout New England. ABC notes that its program differs from that of its competition in that there is no corporate liability. In other words, the municipality (or corporation in the case of a corporate client) is not liable for cellular telephone charges incurred by its employees in connection with their personal accounts.^{3/}

QUESTIONS:

1. Does the conflict of interest law allow City employees to accept a discounted "government rate" for personal cellular telephone service?
2. May City employees be billed for personal cellular telephone service through a municipal department or agency?

ANSWERS:

1. Yes.
2. No.

DISCUSSION:

Section 23 establishes standards of conduct that are applicable to all public employees in the Commonwealth. In particular, §23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value^{4/} which is not properly available to similarly situated individuals.

We begin by noting that the phrases "similarly situated individuals" and "unwarranted privilege" are not defined in G.L. c. 268A. Nevertheless, we have previously concluded that "where the granting of a benefit is expressly authorized either by statute or made available by common industry-wide practice to all employees of participating organizations, we do not believe that the granting of the benefit ordinarily constitutes an unwarranted privilege not properly available to similarly situated individuals." *EC-COI-87-37*. In other words, while we have

sought to forbid those discounts, the receipt of which would tend to undermine public confidence, we have not said that public service, standing alone, should prohibit a public employee's participation in a widely available discount program. For example, in *EC-COI-87-37*, state employees were allowed to participate in a computer equipment discount negotiated by a state agency for all state employees because *similar* discounts were negotiated in the public and private sector. We found compelling that the equipment discount was available not only to at least 60,000 state employees, but that a large number of private sector employers had negotiated similar employee discounts with the same companies. We therefore concluded that the state employee discount was consistent with a common industry-wide practice and was therefore properly available to similarly situated individuals. Moreover, the benefit was warranted because the availability had been communicated to eligible employees and the negotiation of the discount was a commonly accepted business practice.

In contrast, we have held that a benefit selectively provided to an individual public employee, *EC-COI-87-7*, or to a discrete group of employees, and which is not made available to members of the general public will not be permissible pursuant to §23(b)(2). In *EC-COI-86-14*, concerning an automobile discount program offered to selected law enforcement officers, we stated:

In the case of a selective discount to a public employee, the employee is able to realize a benefit from which the public is excluded. Receipt of such a benefit negates the trust that the public is entitled to place in public employees: that public, not private, interests are furthered when the public employee performs his duties. In such a case the private citizen may reasonably ask why a public official is entitled to compensation or benefits over and above what the taxpayer has authorized and from which he has been excluded.

In addition, we have also cautioned that issues may arise under §23 if the availability of the discount is not widely publicized or known by all eligible employees. In such a case, officials involved in negotiating the discount or those made aware of it may be found to have an unwarranted privilege not available to similarly situated employees. A broad-based and uniform employee discount precludes any appearance that particular employees have been selected for a discount because they may be in a public position where they can benefit the giver. See *EC-COI-87-37* (uniform discount offered to all state employees).

In the case at hand, the cellular telephone plan being offered to City employees is similar in most respects to plans available both nationally and statewide to a large class of public and private employees. We therefore find that the discount in question is being made available pursuant to a common industry-wide practice.^{5/} Moreover, the discount is not being offered to an individual or to a discreet group of public employees, but rather is available to all City employees who appear also to have been adequately notified of the opportunity to participate. We conclude that City employees who take advantage of the plan will not be receiving an unwarranted privilege not available to similarly situated individuals. Such employees will not therefore violate §23(b)(2).^{6/}

The use of a city department, staff, equipment, or any other municipal resources for purposes of implementing the discount program would, however, raise an issue under §23(b)(2). This is because the use of City resources by City employees for personal purposes constitutes an unwarranted privilege not available to similarly situated individuals. Section 23(b)(2) dictates that the use of public time and resources must be limited to serving public rather than private purposes. See, e.g. *EC-COI-93-6* (police associations may not use public facilities as a mail drop for association solicitations). The City must therefore work with ABC to insure that City employees may not use City telephone equipment or City cellular telephone accounts in connection with their private cellular telephone service. For example, billing for private cellular telephone accounts may not be issued through any City department or agency. Rather, a City employee must be billed for his private account at his home or other private address. In conclusion, the City must prohibit the use of any public resources to implement private cellular telephone service for City employees.

DATE AUTHORIZED: April 11, 1995

^{1/}ABC indicates that, based on its past practice with the employees of other corporate clients, City employees would continue to be eligible for the discounted rate, even, if at some time in the future, the City were to choose a different cellular telephone carrier for its corporate accounts.

^{2/}ABC is currently seeking to expand its discount rate to cover other state and federal government employees where, until recently, tariffs have been less favorable.

^{3/}ABC believes that this fact distinguishes it from its competition. According to ABC, other cellular telephone companies hold the corporation liable for charges incurred in connection with the first twenty cellular telephone lines personally held by the corporation's employees.

^{4/}Anything valued at \$50 or more is "of substantial value." *Commonwealth v. Famigletti*, Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8; EC-COI-93-14*.

^{5/}Through previous opinion requests, we are aware that another cellular phone carrier is offering discounted rates to government employees in Massachusetts. As we understand it, a tariff change for a "Government Plan" filed with, and approved by, the Massachusetts Department of Public Utilities allows discounted cellular telephone rates to be charged to any federal, state or municipal employee for personal cellular telephone service. As in the ABC plan, no government agency has any legal or financial obligation to the cellular telephone company or its agent. Rather, the public employees, as individuals, are responsible for the cost associated with such cellular telephone service. Moreover, the Government Plan is analogous in concept to the carrier's "Associate Plan," a special plan for individuals who are employed by a business organization or government agency which has a contract with that carrier. In addition, there is an "Associate Plan" applicable to employees of associations that are not incorporated under state law. We understand that originally, the Government Plan was somewhat more favorable than the Associate Plans because of certain competitive factors, but at present, the various plans offer substantially the same rates. The above-described plans further demonstrate that discounted cellular telephone rates are widely available to public and private employees in the Commonwealth as part of an industry-wide practice.

^{6/}In addition, where the discount in question is being provided to all City employees, we will not find that it is being offered "for or because of" the official acts of any particular City employee. The discount does not therefore raise any issues under G.L. c. 268A, §3.